Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

COR-BON CUSTOM BULLET CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit err in holding that *if* an affirmative act of evasion *is* an element of tax evasion under 26 U.S.C. § 7201, it is not an element which must be alleged in the indictment?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Cor-Bon Custom Bullet Company, has no parent companies and there are no publicly held companies that own 10% or more of its stock.

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Petitioner Cor-Bon Custom Bullet Company respectfully requests that a writ of certiorari issue for review of the April 25, 2002 judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the District Court is reported at *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576 (6th Cir. 2002). The Slip Opinion is attached as Appendix A. The ruling from the bench of the United States District Court for the Eastern District of Michigan denying Cor-Bon Custom Bullet Company's motion to dismiss, *United States v. Cor-Bon Custom Bullet Company, et al.*, Case No. 97-CR-80681 (E.D. Mich. Mar. 30, 2000), Trial Transcript at pages 75-76, is unpublished and is attached as Appendix B.

STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction by virtue of 28 U.S.C. § 1254(1) to review the April 25, 2002 judgment of the United States Court of Appeals for the Sixth Circuit in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> **Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> **Jury trial for crimes, and procedural rights**
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

26 U.S.C. § 7201 provides:

Sec. 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7202 provides:

Sec. 7202. Willful failure to collect or pay over tax.

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7203 provides in pertinent part:

> **Sec. 7203. Willful failure to file return, supply information, or pay tax.**
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply and information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. . . .

STATEMENT OF THE CASE

Cor-Bon Custom Bullet Company ("Cor-Bon") manufactures high-quality ammunition for Federal and State law enforcement agencies and other customers. Peter R. Pi founded Cor-Bon and is its president.

On or about June 26, 1997, a Federal grand jury in Detroit, Michigan indicted Peter R. Pi and Cor-Bon for wilfully failing to collect, account for and pay the tax on shells and cartridges, in violation of 26 U.S.C. § 7202. (R. 1, Indictment, Amended Jt. Apx., vol. 1, p. 11). But Mr. Pi and his company did not have a duty to collect, account for and pay the tax in question. On Defendants'

motion the United States District Court for the Eastern District of Michigan dismissed the indictment. (R. 8, Order Granting Motion to Dismiss, Amended Jt. Apx., vol. 1, p. 56).

Then Peter Pi and Cor-Bon were again indicted, this time for willfully attempting to evade or defeat the tax on shells and cartridges or the payment thereof, in violation of 26 U.S.C. § 7201. (R. 6, First Superseding Indictment, Amended Jt. Apx., vol. 1, p. 22). At trial, after the jury was impaneled, Defendants moved to dismiss on the ground that the First Superseding Indictment failed to allege an affirmative act of evasion, one of the elements of tax evasion under 26 U.S.C. § 7201. (Trial Transcript vol. 1, pp. 56-60; Motion to Dismiss First Superseding Indictment, Amended Jt. Apx., vol. 2, p. 475). The allegations of the First Superseding Indictment were limited to the words of 26 U.S.C. § 7201. But those words include only two of the three elements of tax evasion (willfulness and underpayment of tax). The third element, affirmative act of evasion, was added by the Supreme Court in *Spies v. United States*, 317 U.S. 492 (1943) and followed in *Sansone v. United States*, 380 U.S. 343 (1965) and legion lower court cases.

Defendants' counsel pointed out that an indictment must allege each element of the offense intended to be charged and cited many authorities for this proposition, most notably *Russell v. United States*, 369 U.S. 749 (1962). Citing many more cases, Defendants' counsel further argued that because the First Superseding Indictment omitted an element of the offense, the Court lacked subject matter jurisdiction. The District Court took the motion under advisement and allowed the trial to proceed. (Trial Transcript, vol. 1, p. 60). Later in the trial, the District Court ruled that the First

Superseding Indictment adequately alleged an offense under 26 U.S.C. § 7201, and denied the motion. (Trial Transcript, vol. 4, pp. 76-76, Appendix B). The jury acquitted Peter Pi on all counts, but convicted Cor-Bon on 13 of 16 counts (each count in the First Superseding Indictment was for a separate calendar quarter).

Cor-Bon appealed. The United States Court of Appeals for the Sixth Circuit acknowledged that the First Superseding Indictment failed to allege an affirmative act of evasion. Slip Op. at 3 (Appendix A). But the Sixth Circuit was unconvinced that an affirmative act of evasion *is* an element of tax evasion under 26 U.S.C. § 7201:

> Even though *Spies* did not directly address the adequacy of felony tax indictments, it has been deemed relevant to that issue. Cases now routinely state that, under the holding in *Spies*, an affirmative act of evasion is an element of an offense under § 7201. *See, e.g.*, *Sansone v. United States*, 380 U.S. 343, 351 (1965); *United States v. Barrow*, 118 F.3d 482, 489 (6th Cir. 1997); *United States v. Daniel*, 956 F.2d 540, 542 (6th Cir. 1992); *Clay v. United States*, 218 F.2d 483, 486 (5th Cir. 1955). Thus, the weight of authority supports the proposition that three elements must be proved to sustain a conviction under § 7201: (1) a tax deficiency, (2) willfulness, and (3) an affirmative act of evasion or attempted evasion. *See, e.g.*, *Sansone*, 380 U.S. at 351; *Barrow*, 118 F.3d at 489; *Daniel*, 956 F.2d at 542; *but see Lott v. United States*, 309 F.2d 115, 118 (5th Cir. 1962) (asserting that *Spies* did not add a substantive

> element to an offense under § 7201, but only construed the statutory language "willfully attempts in any manner to defeat any tax").

Slip. Op. at 5-6 [footnote omitted] (Appendix A). The Sixth Circuit resolved its difficulty with the affirmative act of evasion element by holding that *if* an affirmative act of evasion *is* an element of an offense under 26 U.S.C. § 7201, it need not be alleged in the indictment. Slip. Op. at 6 and n.5 (Appendix A). This novel holding clouds the elements of tax evasion established by the Supreme Court in *Spies* and *Sansone*. The Sixth Circuit's holding also blurs the bright line drawn by the Supreme Court in *Russell v. United States*, 369 U.S. 749 (1962) that an indictment must aver every element of the offense intended to be charged. If allowed to stand, the Sixth Circuit's holding in this case will open the door to lower courts pondering whether various elements of the spectrum of criminal offenses need be alleged in an indictment.

The Sixth Circuit made a factual finding that "Cor-Bon knew which specific affirmative acts of evasion it was accused of committing," Slip Op. at 7 (Appendix A), but there is no support for this in the record. In fact the Defendants did not learn of what affirmative acts of evasion the government was alleging until the Prosecutor's closing argument. And certainly a grand jury never passed upon those alleged affirmative acts.

The Sixth Circuit held that the failure of the First Superseding Indictment to allege an affirmative act of evasion was harmless error (though harmless error had not been raised below or briefed), and affirmed the conviction of Cor-Bon. The cases which the Sixth Circuit cited for this proposition

do not support the proposition. Slip. Op. at 8 (Appendix A). The case primarily relied upon my the Sixth Circuit, *United States v. Prentiss*, 206 F.3d 960 (10th Cir. 2000), actually supports Petitioner.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S OPINION BELOW CLOUDS THE ELEMENTS OF TAX EVASION ESTABLISHED BY THE SUPREME COURT IN *SPIES* AND *SANSONE*, AND BLURS THE BRIGHT LINE DRAWN BY THE SUPREME COURT IN *RUSSELL* THAT AN INDICTMENT MUST ALLEGE EACH ELEMENT OF THE OFFENSE INTENDED TO BE CHARGED

Spies v. United States, 317 U.S. 492 (1943), was a prosecution for tax evasion under Section 145(b) of the Revenue Act of 1936. Section 145(a) of the Revenue Act of 1936 provided:

> Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations,

> shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

Section 145(a) of the 1936 Act is now codified as Section 7203 of the Internal Revenue Code of 1986.

Section 145(b) of the Revenue Act of 1936 provided:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to the penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Section 145(b) of the 1936 Act is now codified as Section 7202 of the Internal Revenue Code of 1986.

Spies wanted the jury instructed on the lesser included offense of Section 145(a) of the Revenue Act of 1936. The District Court refused this request, and Spies was convicted of the felony of tax evasion under Section 145(b). The Second Circuit affirmed. The similarity of the two statutes troubled the Supreme Court: "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one,

which is made a felony, is not easy to detect or define." 317 U.S. at 497. Both statutes involved a failure to pay tax when due, and both required willfulness. Yet violation of one statute was a misdemeanor and of the other a felony. The Supreme Court concluded that conviction of the felony of tax evasion required proof of "some willful commission." The Court then illustrated this element:

> By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from *conduct* such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, any *conduct*, the likely effect of which would be to mislead or to conceal.

317 U.S. at 499 (emphasis added). This element is factual. To convict a person of tax evasion, the government must allege and prove specific conduct by the person constituting an attempt to evade or defeat the tax.

In *Sansone v. United States*, 380 U.S. 343, 351 (1965), the Supreme Court held: "As has been held by this Court, the elements of § 7201 are willfulness; the existence of a tax deficiency . . .; and an affirmative act constituting an evasion or attempted evasion of the tax." These remain the three elements of tax evasion today. *E.g.*, *United States v. Barrow*, 118 F.3d 482, 489 (6th Cir. 1997); *United States v. Daniel*, 956 F.2d 540, 542 (6th Cir. 1992); *United States v. Hook*, 781 F.2d 1166, 1171 n. 4 (6th Cir. 1986).

The Sixth Circuit below acknowledged that the First Superseding Indictment did not allege an affirmative act of evasion. Slip Op. at 3 (Appendix A). But the Court of Appeals was unconvinced that an affirmative act of evasion *is* an element of an offense under § 7201. The Sixth Circuit resolved its difficulty by holding that *if* an affirmative act of evasion *is* an element of an offense under 26 U.S.C. § 7201, it need not be alleged in the indictment. Slip Op. at 6 (Appendix A). This novel holding clouds the affirmative act of evasion element established by the Supreme Court in *Spies* and *Sansone* and legion lower court cases.

The Sixth Circuit's opinion below also blurs the bright line drawn by the Supreme Court in *Russell v. United States*, 369 U.S. 749 (1962), that an indictment must allege each element of the offense intended to be charged. The novel holding below invites lower courts to ponder whether various elements of the spectrum of criminal offenses need be alleged in an indictment.

Each of the defendants in *Russell* was indicted for refusing to answer questions when summoned by a congressional subcommittee, in violation of 2 U.S.C. § 192. The elements of the offense were that the defendant (1) refused to answer when summoned (2) a question pertinent to an investigation by the congressional subcommittee. Each defendant moved to quash the indictment against him on the ground that it failed to state the subject under investigation at the time of the subcommittee's interrogation of the defendant. Each defendant's motion was denied; each defendant was convicted; and the District of Columbia Circuit affirmed each defendant's conviction.

Reversing, the Supreme Court outlined the two criteria by which the sufficiency of an indictment is to be measured:

> These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and, secondly, "'in case any other proceedings are taken against him of a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' [Citing cases]."

369 U.S. 764-65. Alleging the elements of the offense alone is enough if doing so sufficiently apprises the defendant of what he must be prepared to meet. But the First Superseding Indictment here does not even allege the elements of the offense.

The Supreme Court in *Russell* continued in language prophetic to this case:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, — it must descend to particulars.'" United States v. Cruikshank, 92 U.S. 542, 558, 23 L. Ed. 588. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him * * *" is defective, although it may follow the language

of the statute." United States v. Simmons, 96 U.S. 360, 362, 24 L. Ed. 819. "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth *all the elements* necessary to constitute the offense intended to be punished; * * *' United States v. Carll, 102 U.S. 611, 612, 26 L. Ed. 1135. "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." United States v. Hess, 124 U.S. 483, 487, 8 S.Ct. 571, 573, 31 L.Ed 516. See also [citing cases]. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions. [Footnote citing cases omitted].

The vice which inheres in the failure of an indictment under 2 U.S.C.§ 192, 2 U.S.C.A. § 192 to identify the subject under inquiry is thus the violation of the basic principle "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, * * *." United States v. Simmons, supra, 96 U.S. at 362. A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue

> undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosection free hand on appeal to fill in the gaps of proof by surmise or conjecture. . . .

369 U.S. 765-66 (emphasis added).

The Supreme Court continued:

> But it is a settled rule that a bill of particulars cannot save an invalid indictment. [Citing cases]. When Congress provided that no one could be prosecuted under 2 U.S.C. § 192, 2 U.S.C.A. § 192 except upon an indictment, Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry. A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. *To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.* See Orfield, Criminal Procedure from Arrest to Appeal, 243.

369 U.S. 770 (emphasis added).

The Sixth Circuit made a factual finding that "Cor-Bon knew specific affirmative acts of evasion it was accused of committing." Slip Op. at 7. But there is no support for this in the record. The Defendants did not learn what affirmative acts of evasion the government was alleging until closing argument, when the Prosecutor made the following vague allusion:

> The second element, affirmative acts of evasion. First of all, the defendants kept two separate records. You've got – they had the complete invoices on the computer, then they had Government Exhibit 4, Government Exhibit 5, Government Exhibit 6 and Government Exhibit 7. If the ATF ever came in and said, okay, in two weeks we're going to do an audit, this is what the ATF would have seen. They would have gotten the computer; they would have gotten the hard drive, and as part of an audit, they would have conducted a search warrant. That's a criminal investigatory tool.
>
> And, what does Bambi Fisher represent those? You heard Agent Marion explained that he found for April of 1995 at set of group invoices, that was was different than what was found on the computer. They destroyed records. They printed out the invoices; took out support on what they wanted to report and threw the rest away. The Defendant Peter Pi instructed Bambi Fisher to destroy the records. But remember, ladies and gentlemen, she worked for him. He didn't work for her. She left his employment, Defendant's Exhibit 3, resignation, new job. He destroyed the records himself before she was doing it. She was-

> he would take those invoices, group them and get rid of the rest. They under-reported the sales on the excise tax returns, Government Exhibit 3, and on the bi-monthly deposits, and in there. And then they failed to file the returns for three of the quarters.

(Trial Transcript, vol. 6, pp. 98-99, Amended Jt. Apx. vol. 2, pp. 569-70). And certainly a grand jury never found the affirmative acts of evasion alleged by the Prosecutor in his closing argument.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE CASES CITED BY THE SIXTH CIRCUIT BELOW DO NOT SUPPORT THE PROPOSITION FOR WHICH THE SIXTH CIRCUIT CITED THEM

The requirement that an indictment allege every element of an offense is jurisdictional; omission of an element from an indictment deprives the court of subject matter jurisdiction. When a court realizes that it lacks subject matter jurisdiction over a case, it must dismiss the case forthwith, even if the issue of subject matter jurisdiction is raised for the first time on appeal. *E.g.*, *United States v. Brown*, 995 F.2d 1493, 1504-05 (10th Cir.), *cert. denied*, 510 U.S. 935 (1993); *United States v. Cabrera-Teran*, 168 F.3d 141, 146-47 (5th Cir. 1999); *United States v. Denmon*, 483 F.2d 1093, 1098 (8th Cir. 1973); *United States v. Hayes*, 775 F.2d 1279, 1282-83 (4th Cir. 1985), *reh'g denied* (1986); *United States v. King*, 587 F.2d 956, 963-64 (9th Cir.), *reh'g and reh'g en banc denied* (9th Cir. 1978); *United States v. Lopez*, 2 F.3d 1342, 1368 (5th Cir.), *reh'g and suggestion for reh'g*

en banc denied (5th Cir. 1993), *aff'd on other grounds*, 514 U.S. 549 (1995); *United States v. Prentiss*, 206 F.3d 960, 964-66 (10th Cir. 2000); *United States v. Spinner*, 180 F.3d 514, 516-17 (3d Cir. 1999); *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 177-80 (6th Cir. 1992); *United States v. Wander*, 601 F.2d 1251, 1258-59, 1263 (3d Cir. 1979).

In this case, the failure of the First Superseding Indictment to allege an affirmative act of evasion, an element of the offense sought to be charged, voided the District Court's subject matter jurisdiction. When the lack of subject matter jurisdiction was brought to the District Court's attention, the District Court should have dismissed the case forthwith.

The Sixth Circuit had a different view:

> Cor-Bon argues that the failure of the indictment to allege affirmative acts of evasion deprived the district court of subject-matter jurisdiction. A majority of the circuits, however, has specifically rejected the notion that the failure of an indictment to allege an element of an offense charged prevents a district court from having subject-matter jurisdiction over the indictment. *United States v. Sanchez*, 269 F.3d 1250, 1273 (11th Cir. 2001); *United States v. Prentiss*, 256 F.3d 971, 981 (10th Cir. 2001); *United States v. Nance*, 236 F.3d 820, 825-26 (7th Cir. 2000); *United States v. Majica-Baez*, 229 F.3d 292, 310-12 (1st Cir. 2000). Instead, "such failure is subject to harmless error review." *Prentiss*, 256 F.3d

> at 981. Given our previous disposition of the question of harmless error, Cor-Bon's argument fails.

Slip Op. at 8. The cases cited by the Sixth Circuit do not at all stand for the proposition for which the Sixth Circuit cited them. The case primarily relied upon by the Sixth Circuit, *United States v. Prentiss*, 206 F.3d 960 (10th Cir. 2000), actually supports Petitioner. The indictment in *Prentiss* alleged that the defendant "did willfully and maliciously set fire and attempt to set fire to a dwelling[, i]n violation of 18 U.S.C. § 1152 and 18 U.S.C. § 81." The defendant argued for the first time on appeal that the indictment failed to allege the defendant's Indian or non-Indian status or the Indian or non-Indian status of the victim, elements of the offense, thus depriving the District Court subject matter jurisdiction. The Tenth Circuit noted that Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that "the indictment or the information shall be a plain, concise and definite written statement of *the essential facts* constituting the offense charged." 206 F.3d at 964 (emphasis added). The Tenth Circuit noted that the requirement that an indictment allege all of the elements of the offense intended to be charged "informs the defendant of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution." *Id.* The Tenth Circuit further found that the requirement that an indictment allege all the elements of the offense "derives from he Fifth Amendment, which requires that the grand jury have considered and found all elements to be present." *Id.* The Tenth Circuit concluded that the failure of the indictment in the case before it to allege all the elements of the offense was "a jurisdictional defect requiring dismissal," and reversed the defendant's conviction.

The remaining cases cited by the Sixth Circuit, *United States v. Majica-Baez*, 229 F.3d 292 (1st Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001); *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000), *cert. denied*, __ U.S. __, 122 S. Ct. 79 (2001); and *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001), *cert. denied*, __ U.S. __, 122 S. Ct. 1327 (2002), involved the issue of whether factors which enhanced a sentence were elements of the offense required to be alleged in the indictment. These cases have no relevance here; there is no question that an affirmative act of evasion is an element of an offense under 26 U.S.C. § 7201.

The Sixth Circuit has stood the law upon its ear in this case.

CONCLUSION

The Supreme Court should grant a writ of certiorari, and either summarily reverse the conviction of Petitioner, or set the case for briefing and oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED APRIL 25, 2002

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00-2420

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

COR-BON CUSTOM BULLET CO.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 97-80681 — Bernard A. Friedman, District Judge.

Submitted: March 8, 2002

Decided and Filed: April 25, 2002

Before: *KENNEDY* and *BOGGS*, Circuit Judges; *COFFMAN*, District Judge.*

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* The Honorable Jennifer B. Coffman, United States District Judge for the Eastern and Western Districts of Kentucky, sitting by designation.

Appendix A

OPINION

COFFMAN, District Judge. This appeal raises the question of whether a felony conviction for tax evasion under 26 U.S.C. § 7201 must be reversed because the indictment did not allege specific affirmative acts of evasion. Because the defendant has not suffered prejudice as a result of the alleged defect, we AFFIRM the district court's judgment.

I. Background

Cor-Bon Custom Bullet Co. ("Cor-Bon") manufactures firearm ammunition. 26 U.S.C. § 4181 imposes an 11% excise tax on all taxable sales of ammunition by such manufacturers. Cor-Bon was indicted on sixteen counts of tax evasion under 26 U.S.C. § 7201, for allegedly evading its § 4181 tax liability during each calendar quarter from 1991 through 1995 by reporting only part of its ammunition sales. Each count, tracking the applicable statutory language,[1] read:

> On or about [date] in the Eastern District of Michigan, Southern Division, Defendants PETER PI[2] and COR-BON CUSTOM BULLET CO., willfully attempted to evade and defeat a tax imposed under this title or the payment thereof

1. 26 U.S.C. § 7201 provides, in pertinent part, that "[a]ny person who willfully attempts in any manner to evade or defeat any tax . . . shall . . . be guilty of a felony. . . ."

2. Peter Pi, the owner of Cor-Bon, was acquitted on all counts and does not, therefore, join in this appeal.

> on ammunition sales that were due and owing from COR-BON CUSTOM BULLET CO. for the [quarter and calendar year in question][3] in violation of Title 26, United States Code, sections 4181 and 7201.

Immediately after the jury was impaneled, Cor-Bon filed a motion to dismiss, attacking the indictment as fatally defective because it did not allege an affirmative act of evasion. The district court denied the motion as untimely and meritless. It did not, however, expressly address whether an affirmative act of evasion should have been alleged in the indictment.

Although the indictment did not allege an affirmative act, Cor-Bon learned soon after indictment, and well before trial, that a disgruntled ex-employee, Bambi Fischer, would be testifying that it filed false tax returns, destroyed sales invoices, and maintained a second, false set of records to conceal the true amount of its ammunition sales. During the jury trial, Cor-Bon cross-examined Fischer regarding her allegations and otherwise presented a robust defense. Both sides argued Cor-Bon's alleged affirmative acts to the jury. On April 5, 2000, the jury found Cor-Bon guilty of thirteen counts. On November 16, 2000, Judge Friedman sentenced it to three years' probation and ordered it to pay $200,000 in restitution, a fine of $240,000, and a special assessment of $2,600. This appeal followed.

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3. The counts were identical except for the dates involved. Each quarter of every calendar year from 1991 to 1995 supported a separate count.

On appeal, Cor-Bon renews the arguments that it made to the district court: that the indictment was defective because it did not allege an affirmative act of evasion and that this defect precluded the district court from having subject-matter jurisdiction over the case.

II. Discussion

A. Adequacy of the Indictment

Whether an indictment adequately charges an offense is a question of law subject to *de novo* review. *United States v. Collis*, 128 F.3d 313, 317 (6th Cir. 1997). An indictment adequately charges an offense if it (1) includes the elements of the offense intended to be charged, (2) notifies the defendant of "what he must be prepared to meet," and (3) allows the defendant to invoke a former conviction or acquittal in the event of a subsequent prosecution. *Russell v. United States*, 369 U.S. 749, 763-64 (1962); *United States v. Martinez*, 981 F.2d 867, 872 (6th Cir. 1992); *United States v. Vanover*, 888 F.2d 1117, 1120 (6th Cir. 1989). Additionally, "[i]n an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty, set forth all of the elements necessary to constitute the offence intended to be punished." *Russell*, 369 U.S. at 765 (quoting *United States v. Carll*, 105 U.S. 611, 612 (1881)).

In *Spies v. United States*, 317 U.S. 492, 500 (1942), the Supreme Court reversed a conviction under the statutory predecessor to § 7201, § 145(b) of the Revenue Act of 1936,

because the trial court refused to instruct the jury that an affirmative act is necessary to constitute a willful attempt to evade taxes. According to the Court, an affirmative act of evasion includes, but is not limited to, "conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income . . . [or] any conduct, the likely effect of which would be to mislead or to conceal." *Id.* at 499. The Court explained that an affirmative act of evasion distinguishes the felony offense of tax evasion under § 145(b) from lesser tax offenses such as the willful failure to pay taxes under § 145(a). *Id.*[4]

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4. Section 145(a) provided that "[a]ny person required . . . to pay any tax . . . who willfully fails to pay such tax . . . shall, in addition to other penalties provided by law, be guilty of a misdemeanor. . . ." Section 145(b) provided that "any person required . . . to collect, account for, and pay over any tax . . . who willfully attempts in any manner to evade or defeat any tax. . . shall, in addition to other penalties provided by law, be guilty of a felony. . . ." *Spies* distinguished these two prohibitions as follows:

> The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt," as used in the felony subsection. . . . [I]n employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors.

Spies, 317 U.S. at 498-99. Sections 145(a) and (b) have been replaced by 26 U.S.C. § 7203 and § 7201, respectively. *See United States v. Hook*, 781 F.2d 1166, 1171, n. 4 (6th Cir. 1986).

Even though *Spies* did not directly address the adequacy of felony tax indictments, it has been deemed relevant to that issue. Cases now routinely state that, under the holding in *Spies*, an affirmative act of evasion is an element of an offense under § *7201*. *See, e.g.*, *Sansone v. United States*, 380 U.S. 343, 351 (1965); *United States v. Barrow*, 118 F.3d 482, 489 (6th Cir. 1997); *United States v. Daniel*, 956 F.2d 540, 542 (6th Cir. 1992); *Clay v. United States*, 218 F.2d 483, 486 (5th Cir. 1955). Thus, the weight of authority supports the proposition that three elements must be proved to sustain a conviction under § 7201: (1) a tax deficiency, (2) willfulness, and (3) an affirmative act of evasion or attempted evasion. *See, e.g.*, *Sansone*, 380 U.S. at 351; *Barrow*, 118 F.3d at 489; *Daniel*, 956 F.2d at 542; *but see Lott v. United States*, 309 F.2d 115, 118 (5th Cir. 1962) (asserting that *Spies* did not add a substantive element to an offense under § 7201, but only construed the statutory language "willfully attempts in any manner to defeat any tax").[5]

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5. In *Clay v. United States*, 218 F.2d 483 (5th Cir. 1955), the Fifth Circuit reversed a felony tax conviction because the indictment failed to allege an affirmative act of evasion. Without expressly overruling *Clay*, however, the Fifth Circuit subsequently decided *Lott*, which upheld an indictment pled "substantially in the language of the statute" after deciding that *Spies* did not add the substantive element of an affirmative act. This holding is weakened, however, by the fact that the indictment in *Lott* actually went further than charging the offense in the words of the statute-it alleged affirmative acts. *See Lott*, 309 F.2d at 118. When given an opportunity to resolve the conflict between *Lott* and *Clay* in *United States v. Williams*, 928 F.2d 145 (5th Cir. 1991), however, the Fifth Circuit did not take it, although its holding indicates that *Clay* retains jurisprudential vitality. (Cont'd)

B. Harmless Error

Although an affirmative act constitutes an element of a § 7201 case, this court need not decide whether an indictment under § 7201 must allege an affirmative act because the deficiency in the indictment here, if any, constituted harmless error. Cor-Bon does not claim that it lost any of the protections intended to be furnished by the requirement that an indictment allege all of the elements of the offense charged. This requirement, which derives from the Fifth Amendment's Due Process, Double Jeopardy, and Grand Jury Clauses and the Sixth Amendment's Notice Clause, seeks primarily to ensure that an accused is reasonably informed of the charge made against him so that he can prepare a defense. *See Russell*, 369 U.S. at 766-67. Cor-Bon, however, does not claim that the failure of the indictment to allege an affirmative act prevented it from preparing a defense or caused it surprise or prejudice. Nor does the record suggest that Cor-Bon was disadvantaged in any way by the indictment's alleged deficiency. Instead, the record indicates that Cor-Bon knew which specific affirmative acts it was accused of committing and pursued a vigorous defense to attempt to show that it had not committed them. For example, in addition to its probing cross-examination of Bambi Fischer, Cor-Bon presented the testimony of two expert witnesses in order to refute the government's case.

(Cont'd)
As these cases constitute Fifth Circuit precedent, and there is no Sixth Circuit case addressing the issue of whether affirmative acts must be alleged in the indictment, this issue need not be resolved at present.

The Supreme Court has observed that there has been a "drift of the law away from the rules of technical and formalized pleading," and that, therefore, "convictions are no longer reversed because of minor and technical deficiencies which d[o] not prejudice the accused." *Russell*, 369 U.S. at 763 According to the Court, this trend culminated in the adoption of Fed.R.Crim.P. 52(a), which provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." "Substantial rights, in turn, are affected only when a defendant shows 'prejudice to his ability to defend himself at trial, to the general fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions.' " *United States v. Hathaway*, 798 F.2d 902, 911 (6th Cir. 1986) (quoting *United States v. Miller*, 471 U.S. 130, 138 n.5 (1985)). This rule is fully applicable to the present appeal. As Cor-Bon failed to meet its burden of proving prejudice, and has not even alleged prejudice, any defect in the indictment was harmless error.[6] *See id.* at 489; *United States v. Williams*, 152 F.3d 294, 299 (6th Cir. 1998). To hold otherwise would be to hold the government "to such strictness of averments as might defeat the ends of justice." *Lott*, 309 F.2d at 118.

C. Subject-matter Jurisdiction

Cor-Bon argues that the failure of the indictment to allege affirmative acts of evasion deprived the district court of subject-matter jurisdiction. A majority of the circuits,

6. The district court did not rule that any defect in the indictment constituted harmless error. Yet this court may affirm a district court's judgment on any ground supported by the record. *City Mgmt. Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 251 (6th Cir. 1994).

however, has specifically rejected the notion that the failure of an indictment to allege an element of an offense charged prevents a district court from having subject-matter jurisdiction over the indictment. *United States v. Sanchez*, 269 F.3d 1250, 1273 (11th Cir. 2001); *United States v. Prentiss*, 256 F.3d 971, 981 (10th Cir. 2001); *United States v. Nance*, 236 F.3d 820, 825-26 (7th Cir. 2000); *United States v. Mojica-Baez*, 229 F.3d 292, 310-12 (1st Cir. 2000). Instead, "such failure is subject to harmless error review." *Prentiss*, 256 F.3d at 981. Given our previous disposition of the question of harmless error, Cor-Bon's argument fails.

III. Conclusion

For the foregoing reasons, the judgment of the district court is **AFFIRMED.**

APPENDIX B — JURY TRIAL — VOLUME 4 DATED THURSDAY, MARCH 30, 2000

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Also, the Court has an outstanding motion to dismiss the first superseding indictment. The Court has had an opportunity to review that matter. I've studied the law and rule as follows: Number one, the Court will deny the motion for the following reasons: Number one, the Court believes it could if it so chose to deny the motion strictly procedurally. It's way too late. It violates all of the pertinent local rules concerning the filing of motions, waiver and so forth.

However the Court believes also that it should be decided substantively, but if it were to decide it procedurally, the arguments would weigh but since the defendant has raised jurisdictional issues, I think the Court should decide it.

The Court has had an opportunity to review the laws, has reviewed — allowed briefs on both sides, both sides followed briefs, replies, et cetera, and the Court believes that reading the first superseding indictment in this particular matter and it pertains to all of the requirements of the cases that are both Sixth Circuit as well as throughout the nation. Number one, it contains the elements of the offense intended to be charged. Number two, it sufficiently apprises the defendant of what he must be prepared to meet, and it allows the defendant to invoke any kind of defense that they have including double jeopardy or any other kinds of plea — other kinds of things that he believes that he should have. It doesn't just not have to contain every single kind of thing to contain the elements of the offense and other pertinent

matters. The Court believes at this point it certainly does that well within all of the statutory provisions as well as all of the case provisions. Therefore, the Court will deny the motion.

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